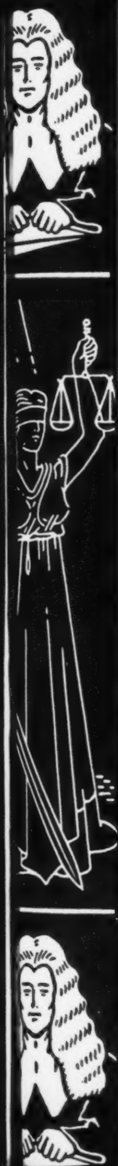

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Case *and* Comment

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Volume 55 No. 4

The Continuity of The United States Supreme Court

By HONORABLE HAROLD H. BURTON
Associate Justice, The United States Supreme Court

Condensed from Journal of the
National Association of Referees in Bankruptcy,
January, 1950

PEOPLE sometimes do not realize that the United States Supreme Court is one of the three constitutional branches of the Government and is the only one of the three that is continuous. Under our Constitution, the Congress goes back for rejuvenation every two years. Accordingly, we have today our Eighty-first Congress. It is true that the Senate is something of a continuing body because two-thirds of its members do continue in office in the next Congress. The Senate, acting alone, however, can do but little. It can only ratify treaties and confirm appointments. Each Congress has but a two-year life. Every pending bill dies at the end of that term. Each Congress starts afresh.

Each Presidential term is a new term at the end of four years. When one President succeeds another, he begins a new term. We are now in our 41st Presidential Administration.

The Supreme Court, however, is today, structurally, the same Court that met in 1790. It never adjourns sine die. It adjourns to meet at the time and place appointed by law. If the members of the Court who originally sat on it in 1790 hadn't died, resigned or retired, they still would be there. If the cases that were on the docket at that time had not been disposed of, they still would be there. It is actually a continuous branch of the Government. This continuity relates not only to the structure of the Court, it carries over into the habits of the Court and into the personnel related to it.

The Supreme Court is referred to by James Bryce as the "living voice of the Constitution." That is indicative of the fact that the Court is a continuous body that has the duty of final interpretation of the Constitution. It is so constructed that it will serve with complete continuity throughout the life of the nation.

When Mr. Justice Minton took his oath of office in October, 1949, he became the eighty-seventh member of the Court. Throughout the entire life of the Court it has had fewer members

on it than the Senate has all the time. It is a small continuous body.

The average length of service of a Justice is a little over 15 years. Eight members of the Court have served 30 years or more as a member of it. I will mention them in the order of their length of service so that you may see from their names what their long service has meant to the nation. They are Justice Field, Chief Justice Marshall and Justices Harlan, Story, Wayne, McLean, Washington, and William Johnson. Serving just under 30 years there was Justice Oliver Wendell Holmes, Jr. There you have the names of nine distinguished Justices of the Court whose contributions have been immeasurable. In contrast to that long service, nine Justices served five years or less. The service of seven of the Justices would span the life of the Court. If you begin with Justice Cushing of the original Court, you will find that before Cushing left the Court Marshall had come on it, before Marshall left Wayne had come on, before Wayne left Field had come on, before Field left White had come on, before White left, McReynolds had come on and before McReynolds left, Black had come on the Court.

There is another interesting contribution that is inherent in the service of the members of every court. It is the contribution of the senior Justice in point of service. It is an unsung contribution on the Supreme Court, because, as you know, the Chief Justice of the Supreme Court is not necessarily, or usually, the senior member of it in point of service. He is appointed to the separate office of Chief Justice of the United States. There have been four periods where the Chief Justice also has been the senior on his Court before he left it. In that way the Supreme Court differs from our Courts of Appeals. For example, Chief Judge Biggs is the senior member of the Court of Appeals for the Third Circuit in point of service, and he is, therefore, the Presiding Judge of that court. By statute, the senior judges in point of service become automatically the Chief Judges of the several Courts of Appeals and District Courts.

On every court, including the Supreme Court, there is, however, necessarily someone who has been there longer than anyone else. He always will be visualized by his juniors as a part of the Court as they first knew it when becoming a member of it. He has a longer perspective than anyone else on the Court. His length of service is a special factor in the stability of the Court. The length of service of each member is some natural protection for the decisions made during his incumbency.

One of the striking things about that continuity of senior Justices on our Court is this—

throughout two-thirds of the life of the Court the senior Justice has been a man who has had service on the Court from 20 years up to 34½ years. Therefore, during two-thirds of the life of the Court there always has been somebody there with a perspective that has carried him back over practically a generation. At the same time, others have brought new life to the Court. The combination has been a significant one. During the other one-third of the life of the Court, until 1946, the senior member always had had from 13 to 20 years of service on the Court.

It was my privilege to serve a year with Chief Justice Stone in his twenty-first year on the Court. When he died, in 1946, the Court became the most junior Supreme Court in the history of the United States since it had been nine years old. This was because there was nobody on the Court who had served more than nine years. Justice Black then became and now is the senior member of the Court. He is now in his thirteenth year. There is no cure for such a situation except continued service.

There have been twenty senior Justices of the Court. Their contributions will be evident to you as I recall their names to you. The first was Jay, who was the Chief Justice and the senior member of his own Court as its first appointee. Then Cushing, then Chase, then Washington, then Chief Justice Marshall, then Story, then McLean, then Wayne, then Nelson, then Clifford. Next came Miller, Field and Harlan. Then came White, who later became Chief Justice. He was followed by McKenna, Holmes, Van Devanter and McReynolds. Then came Stone, who had become Chief Justice. He was succeeded as senior Justice by Justice Black. That list demonstrates the contribution that has come from those men who served as the senior member of our Court in an unsung manner. Their devotion to their work led them thus to contribute that benefit which can come only from great length of experience. Chief Justice Hughes told me that he stayed on the Court until he found that at the end of a day he was not able to maintain his full peak of vigor. He was then 79 years old and he retired from active duty. He lived seven years thereafter.

In addition to this individual length of service, the group continuity of the Court is interesting. Such continuity is vital, because the decisions of the Court are not the decisions of any one Justice. They are the decisions of a majority of the Court and the continuity of that majority is the controlling factor in its work. There have been ten periods of five years or more each in which there was no change in the membership of the Court. There has been one period of 12 years, from the early days of Madison to the late days of Mon-

roe, when there was no change on the Court. On the other hand, during the first ten years of Chief Justice Fuller's term of service, there was some change every year. It is a fact also that every President of the United States who has served a full four years in office always has appointed somebody to the Court.

The outstanding example of a Court that was continuous in its membership at a time when continuity was especially vital to its work was in the days of John Marshall. We sometimes speak of John Marshall's constitutional decisions and his leadership. But we should recognize that he had to have a majority with him. When he was appointed, there were six members of the Court, including himself. During most of his term there were seven members of the Court. He had to have at least three more with him to make a majority. In fact, he generally had more than three with him on the important constitutional decisions of his time. As for continuity of membership on his Court, it is remarkable that during his 34½ years of service there served with him Thompson of New York for 12 years, Livingston of New York for 17 years, Todd of Kentucky for 19 years, Story of Massachusetts for 24 years, Duval of Maryland for the same 24 years, Bushrod Washington of Virginia for 28 years and William Johnson of South Carolina for his full 30 years of service.

"That's past history—I don't care to discuss it."

During that period there were 62 constitutional decisions handed down. That Court not only made them, but it protected them. Of those 62 decisions, 36 were written by Marshall himself. Twenty-three of them were handed down without any dissent.

Another element of continuity that was more marked in the early days than it is now was the geographic representation. In the early days the Justices rode circuit and therefore it was considered important to have a Justice reside in the circuit where he generally presided. Today Justices don't ride circuit. Although we do maintain a relationship to the circuits to which we are assigned, we do not generally go there and try cases the way they used to do. The result of this situation in the early days was a great continuity of appointment from certain areas. Today there is still a tendency to distribute appointments to the Court with some regard for geographical representation.

The outstanding example of geographic continuity is that found in what I might call the "New England Chair." There has been one chair of the Court that has been filled by but nine Justices. Every one of these was appointed from New England except one and, during the term of that one, there was another New Englander already on the Court. Accordingly, a New Englander always has been on the Court. The New England chair was filled first by Justice Cushing of Massachusetts. He was followed by Justice Story of Massachusetts, he in turn by Justice Woodbury of New Hampshire. He was followed by Curtis of Massachusetts, Clifford of Maine, Gray of Massachusetts, Holmes of Massachusetts, Cardozo of New York and now by Frankfurter of Massachusetts. While Justice Cardozo of New York was serving in this chair, Justice Brandeis of Massachusetts also was serving on the Court. Similarly, there have been only four years or less when the Court has been without at least one member from the combined area of New York, Pennsylvania and New Jersey.

There's Many a Slip

In UN speeches, State Department officials have learned to expect many a slip between tongue and translation. When, for instance, a Pakistan-India dispute flared recently in the Security Council, the translator persistently put down "six" whenever delegates referred to the Sikhs, a dissenting soldier-sect some of whom were in Pakistan.

The result left some doubt as to the translator's ability, but none concerning the Sikhs' virility.

"Six soldiers," the translator read, "have raped thousands of Pakistan women . . . ."—*Pathfinder.*

THE AMAZING SAGA OF SUPERLEX

By RAPHAEL MUR

Former Editorial Manager, The Harvard Law School Record

Reprinted from
The Harvard Law School Record,
March 9, 1949

FOLLOWING the lead of a hot tip from the Placement Office, your reporter was sent to investigate the possibility of law students' getting summer jobs as counsellors. The counsellors turned out not to be in law offices but in summer camps. He liked the idea so much that he took one of the jobs himself. One of his duties turned out to be telling stories around the campfires, but of the many bright, shiny faces which he saw in their places, some wanted to be All-Americans, others wanted to be cowboys, or even Indians, many wanted to be atomic scientists—but none wanted to be lawyers, nor, a fortiori, law professors.

Your reporter rose to the clear and present danger to the profession, and decided that ignorance of the law was some abuse. He tried commenting on the Commentaries of Kent, bellowing the best of Blackstone, and even told a story of Story, but the children's interest was not aroused. Finding that he could not facit per se, he decided to facit per alium. That alium was Superlex.

This story of Superlex fascinated the youngsters and brought them, cheering, to their feet.

The tale of this legal Paul Bunyan, the kiddies were told, began several years ago on the far-away planet of Bracton, in the town of Coke-on-Littleton. Our hero was the youngest of the Term family consisting of four children. He was named Michaelmas (Mike for short), and his three sisters were named Hilary, Easter, and Trinity. But since Mike had been born after his father's decease, there was a lapse in seisen (this was never allowed for—although contra to Baron Turton—as one of their judges had remarked: "We can never have a lapse in season for the four must just fill up the estate of a year, and this is undoubtedly true") and he was banished to the planet Earth.

When Mike arrived in the United States, he was found by a member of the old lawyers' home of Snug Habeas, and was immediately quasi-adopted by the home. Due to the fact that the size of the planets differed,

the litigational pull was much less here on Earth and Mike found that he could perform outstanding feats. He could run faster than a scintilla juris, he could jump beyond the Rule Against Perpetuities, and he had Shepardized vision which could see through to what was going to happen to any case then being litigated. Perhaps most important of all, he could pull himself up by his bootstraps. Having himself been the victim of a legal technicality, he decided to champion the cause of those in need of his extra-legal services. He attired himself in a pair of blue pin-striped tights, a judicial robe, a rather natty wig and then began his crusade sub nom. SUPERLEX.

When these were surreptitiously stored in his green bag, he worked as a reporter for the Best Publishing Company. Through his efforts, he saw to it that the children were properly taken care of by getting the Negotiable Infants Law passed in 38 states (including the most prolific, Alaska, Hawaii, and the District of Columbia), as well as having his employers make a set of small reports cited Rep. Jr. These reports included such famous civil cases as "in re Goldilocks' Trespasses q. cc. f.," "Matter of Dumpty's Fall," and the very famous English criminal case of Regina v. Alice, 1 Hearts (Wonderland) Jr. 52.

Some of Superlex's favorite pastimes were vesting contingent remainders, firming up credits for depositors of checks, drawing lines for law students not proficient in draftsmanship, and disclosing all the undisclosed principals who have plagued agency law for generations. It is even reported in one of our books that he succeeded in keeping perpetuities in a nutshell after they had once been placed therein.

After cautioning all the little children to keep away from attractive nuisances, your reporter told them that they'd get a complete set of Best's junior reports if they were good all summer. As the children left to rejoin their parents at the end of the summer, one was heard to cry out: "It's a Judge! It's a Justice! It's SUPERLEX!"

Sad But True

Men are complacently settling down to a dependent existence . . . . When he can no longer utilize his mother's apron strings, man attaches himself to the coat-tails of Uncle Sam.—ROY STOKES, *Jaycee Citizen.*

A Good Idea

If we feel a necessity for prejudice, then let it be against the darkness of men's minds and not against the color of their bodies.—KAY ARNOLL, "Who Thought of It First," *New Outlook,* 12-'49.

Mistakes a Trial Judge Too Often Sees

By HON. KARL MILLER
Judge, Thirty-first Kansas Judicial District

Condensed from The Journal of the Bar Association of the State of Kansas, November, 1949

MISTAKES are made in the trial of every lawsuit. Some are serious; others are quite inconsequential. They are charged to both court and counsel. The mistakes of the court are corrected on appeal; the mistakes of counsel are many times reflected in the verdict. Statistics do not show where lies the greater fault, nor point to the more guilty offender. And certainly no inference is here made that most of the mistakes occur on the part of counsel. Without doubt a paper by counsel mentioning — nay even exposing — the mistakes of the court would be of much value to the practice; and at the same time interesting and educational — likewise, entertaining.

For the logic of the case we will divide the lawyers into two classes: the more seasoned barristers and the neophytes, the experienced and beginners. Here it can be said that *experience is the best teacher.* And the mistakes that are mentioned occur almost without exception on the part of the younger practitioners. We take off with the very common mistake of the young lawyer who after losing his first case—or correction, first cases —uses the well worn alibi that the court was against him. This could be so. But it is more likely that the young man has failed to prove his case to the jury's satisfaction, or that he has learned the law of the case too late for success in the immediate contest. While this is not one of the most serious mistakes, it is a mistake, which if continued, will grow into consuming proportions. And the lawyer who blames anyone but himself for the losing of his lawsuits is not headed for the top in his profession.

As our trial begins with the impaneling of the jury, so do the mistakes often begin there. The young attorney is nervous, somewhat embarrassed and plainly scared; and the jurors much more so. He frequently, without telling what the case is about, begins his examination of the jurors with a set of questions prepared beforehand; and too

often continuous, without ceasing, in their use regardless of results, if any. But the juror could not prepare his answers in advance and is somewhat at a disadvantage; it is often his first case also, and he is too scared to remember his name. Instead of helping the juror relieve his embarrassment, by getting him to talk, giving him some sedative, breaking the ice so to speak, the young attorney joins him in his discomfiture—and makes it two of a kind.

Occasionally the juror will in desperation volunteer the information which the attorney has failed to elicit, that he knows all about the case, has talked to witnesses, and has a fixed opinion (especially if the juror is experienced) and the attorney therefore challenges; if the juror is excused, the attorney believes he has won a victory. Maybe.

As to peremptory challenges, the less said the better. The first mistake is that peremptory challenges—or at least the big half of them—are made at all; the second mistake is that they are, as a rule, made without reason or excuse—just on a hunch.

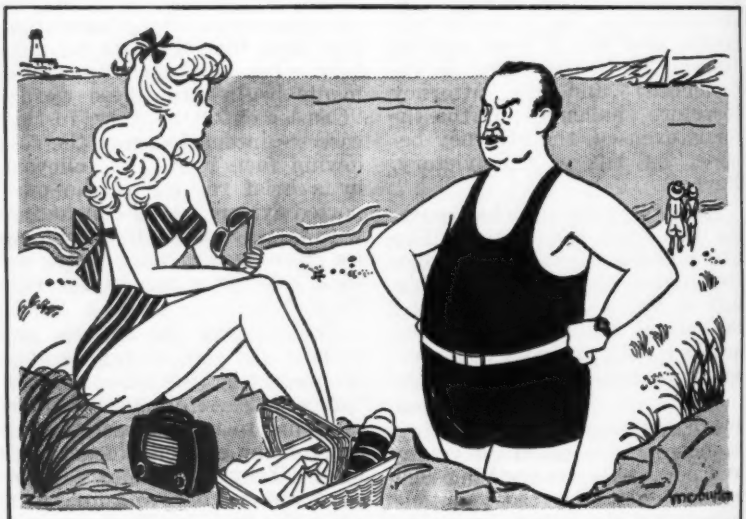
The jury impanelled and sworn, we come to the opening statement. Too often the young attorney tells everything he knows about the case; anticipates what the defense will try to show; follows with a suggestion of his own rebuttal, and then launches into his argument. Not all of the mistakes in making opening statements are confined to the younger practitioners. Not infrequently the older lawyers will endeavor to substitute for their opening statement the evidence in the case — and sometimes not without success. But this is generally considered bad practice. Up to the time this paper is written most opening statements have been too long.

The reading of lengthy pleadings as part of the opening statement is usually a mistake, and the reading of the information in a criminal case ordinarily serves no purpose except to take up some time. Our observation has been that there is no mistake when the opening statements begin with these words, "Gentlemen of the Jury, in this case we intend to prove the following facts" . . . followed by a brief résumé of the purported evidence. And concluding with the suggestion that: "When we have shown these facts, we shall ask for a verdict for our client."

The *trial* of the case is on, without any plan, system or idea of presenting the case; it just "proceeds." Attorneys try their cases just to suit themselves, and not for the effect on court and jury. They sometimes fail to get across to court and jury just what the case is all about, because they neglect to blue-print their case, or to follow a well planned course of procedure.

Overlooking the importance of the first witness whose testimony should not be too long nor too brief, but which should give either an over-all picture of the case, or a comprehensive introduction, they take the first witness who is handy—regardless of his testimony. Let's see what the jury thinks: First in time, first in importance. We have observed cases, based on a meritorious cause of action, sufficient proof at hand, good witnesses, the law as it should be for any deserving lawyer, court and jury O. K.; but the jury, too much impressed with the initial witness, has gotten a distorted picture of the whole case; the remaining evidence, ordinarily most convincing and satisfying, and the skill and logic of counsel, have all failed to restore equilibrium, and then the whole trial goes into a tail spin with a crash landing — the fault of a bad take-off or poor navigation.

In the examination of witnesses three outstanding mistakes might be mentioned. Frequently attorneys have put witnesses on the stand without having previously gone over



"Thought I told you to keep the office open while I went out on business!"

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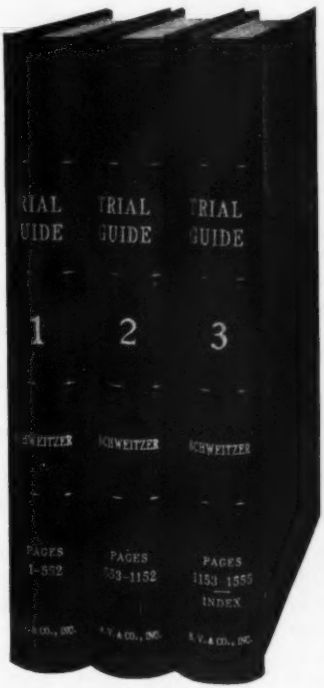

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their testimony with them; in violation of the basic rule: *Never ask your own witness any question unless you know in advance what his answer will be.* This is no proper place for surprises and yet surprises unlimited have marked this spot. We have been present at the calling of one of the other party's witnesses—or the defendant himself, as a witness for plaintiff. This is, let us say, sort of a "surprise" witness. The usual result of a surprise witness is a surprised attorney.

Excessive use of *leading questions* is a common mistake with younger attorneys—occasionally continued by the older practitioners. Over-anxiety may be given as the reason for this mistake; lack of confidence in the ability of the witness to abide by counsel's pre-trial suggestions and instructions; by way of confession and avoidance, the witness is put on the stand; then counsel does the testifying for him, giving him the privilege of yes and no answers. Objection by opposing counsel ordinarily breaks into this, but the use or misuse of leading questions is one of the worst habits of a poor trial lawyer. It is exceeded only by the habit of *repeating all the witness' answers* after him. This habit is devoid of reason, purpose or excuse.

The real test of a good trial lawyer is his ability to *cross-examine.* More cases have been lost here than at any other point. Too many attorneys having taken copious notes on direct examination, give the witness a complete re-hash on cross-examination, without purpose, plan or terminus, thus strengthening the witness' direct testimony and throwing counsel's case for a forty-yard loss. All this when he should know that the secret of cross-examination is its *speed* and *brevity.* Having his own questions in mind, they should be put to the witness in rapid fire order, giving him little, if any, time to reason and think out his answers. Some of the most effective cross-examinations we have noted have consisted of three or four brief questions, followed by answers that wrecked a seemingly good case. The exception to be sure, when a witness opens up, breaks down, and begins to spill the beans; starts telling the truth, even the whole truth. Stay with that witness and his cross-examination as long as you get pay dirt.

Let's sum up here with *three don'ts:* First, *don't cross-examine* unless you know exactly what you want, and are convinced the witness will give it to you. Second, *don't argue* with the witness. Too many cross-examinations develop into a running argument with the witness, which the court will stop sooner or later; and it generally should

be sooner. Third, *don't bully* the witness—unless of course you know how. And it is pretty safe to say that you don't know how.

Rebuttal: This is seldom an important area of the trial; and most attorneys try successfully to make it less important. The common mistake is a belated effort to prove (or re-prove) the case in chief. Let's repeat everything that has once been testified to — it refreshes our own minds; and we hope, it will make a final impression on the jury.

Mistakes of attorneys in making their *objections* to questions of opposing counsel are sometimes very noticeable. Too many young attorneys have a conviction that they should lodge frequent objections to show they are wide awake, believing their neglect to do so may be interpreted as a failure to be on the job. Persistent objection and interference with the examination of witnesses, apparently without cause or reason, we have observed is all too frequent. Just when to object and why is one of the arts of the trial lawyer. Skillfully handled, psychologically used and foundationed on a knowledge of the rules of evidence, objections to certain questions frequently turn the tide of a lawsuit, and change defeat to victory.

Some attorneys cherish the mistaken belief that the *argument* is the real trial of the case. However convinced the laity may be that this is the real battleground — the same is not true. It is an important part of the trial, but not *the* important segment. In times past, attorneys have used this opportunity to ingratiate themselves into the favor of the jury, to dress up the reputation of a client who heretofore never knew respect and to depreciate the standing of opposing counsel and his unimpeachable witnesses; and even indulged in oratory to which, for future reference, they hoped the audience would tune in. Very seldom is it the time and place to "orate," to recite poetry or to shed tears, although in times past both of these have been fatal to justice — especially in criminal cases. On the other hand, we have seen mistakes committed in the waiving of argument. Jurors take great pleasure in the argument; if you waive it they often believe you are afraid of your case, and reinforce their opinion with the verdict. To them, the best argument proclaims the best lawyer —and often the winner. By the same token, some attorneys weary the jury in their consumption of time.

Sometimes attorneys forget that jurors are normal men, and they talk over their heads — sometimes under them; and not infrequently endeavor to put something over on the jury, and get them to return a verdict that will haunt them as Banquo's

ghost when they get back on the streets and to their usual vocations. We need only to say this is not being done by good attorneys.

A final mistake is for attorneys to testify in their closing argument — generally with indifferent success; our observation is that on objection by opposing counsel and proper ruling by the court, the net result is a loss to any lawyer who tries thus to bolster his case.

Verdict: Too many attorneys get mad when the wrong verdict is returned. Sometimes they show too much elation at the right result. Both are bad form. It is a mistake to make too much visible demonstration — or to permit client to do so! Shaking hands with the jurors is bad form to say the least. Why not leave it to the court to express any opinion, if that be proper? More than anyone else he should know whether or not the verdict is just. If so, permit him to thank the jury. If it is not the proper verdict—pause for "station announcements." They will surely come.

We should mention the "wait-

"Must be some reason why these typists are turning out such poor work lately!"

ing period" subsequent to the submission of the case and before the jury raps for the bailiff's attention. We have seen young attorneys walk the floor during this hour. Don't worry; don't get nervous; this is not, after all, your baby. It is the client's baby; you are only the father. The real pains are not yours. You don't have to serve the time; nor pay the judgment. All you have to do is to sustain your client, when justice finally catches up with him.

The greatest mistake, after all, is to manifest the wrong disposition during the trial of a lawsuit. Losing one's temper—and the case; bullying witnesses; quarreling with opposing counsel; antagonizing the court and everybody else — the witnesses, jury and even the audience—serious mistakes all. It is a serious mistake to permit the ruling of the court visibly to upset you. It may be a complete surprise, deprive you of the use of some of your best witnesses and their testimony, change the order of procedure, if not the issue in the case, but if it takes the props from under you, try to keep on your feet. Be nonchalant! Take a recess and endeavor to restore yourself to consciousness. When your own witnesses fail you, it is a mistake to give up, or show any signs of weakening. You may have other resources, take another hold, try something else. And it is a mistake to permit the attitude of opposing counsel to irritate you—visibly; be immune to his taunts and jibes; always repay his sneers and sibilations with extreme courtesy. Even if his argument be sarcastic and disparaging of your case, your witnesses or yourself—you may mentally thumb your nose at him; but in speech and disposition remain the gentleman.

Cases are often lost by making some of these common mistakes; avoid them and win more of your lawsuits!

Inspired Advocacy

A humane ingredient can be found in every personality charged with the commission of a crime. The duty of a defense lawyer is to discover this aspect of his case. Underneath the hardened surface, somewhere along life's route, the accused person manifested traits of kindness, charity and good intent. While these incidents will not constitute admissible evidence at his trial, they form a tie that binds the lawyer to his client. From the moment of their revelation, the lawyer feels an urge to go all the way in the performance of his duties. Without this moral leaven impelling his advocacy, it could meet legal requirements but would never be inspired.

Charles C. Arado in the November-December 1949
Chicago Bar Record

One Successful Cross-examination

By RALPH MAHONEY*, Phoenix, Arizona

MORE than a score of years ago two young lawyers, neither one of whom was known outside his own small Arizona community, were opponents in the trial of an Italian accused of slaying his sweetheart.

The deputy county attorney, who later was to become president of a big utility company, had just about clinched his argument that the murder was premeditated.

The defense counsel, now a famous criminal attorney, had put on a good show, but he knew the evidence he had produced would not hold water with the jury.

On the stand was the state's final witness—the girl's mother. She had had to be helped to the stand, and the prosecuting attorney had emphasized to the jury her suffering at the loss of her daughter, and her invalid condition. With a few more terse remarks he rested his case.

Defense then took over cross-examination of the aged Italian woman.

Drawing himself up to his full height the defense attorney pointed directly at his opponent. "Is that the man who killed your daughter?" he bluntly asked the star witness.

Without a moment's hesitation the woman spoke a firm: "Yes."

The young deputy county attorney blushed furiously. It was three minutes before the judge could restore order in the packed courtroom.

Again pointing ruthlessly to his embarrassed competitor, the defense lawyer demanded of the witness: "Now, madam, are you POSITIVE that is the man who killed your daughter?"

For the second time the woman replied in the affirmative.

In exactly 22 minutes the jury returned a verdict of not guilty.

Outside the courtroom, after the trial, the prosecuting attorney cornered his opponent and asked: "How the devil did you know that my star witness was almost totally blind?"

"I didn't," he replied, "until she turned around and bowed to an empty chair behind the witness stand."

* Mr. Mahoney covers the Superior, City, and Precinct Courts for the Phoenix (Arizona) Republic and Gazette.

Modern Court Services for Youths and Juveniles

By GLENN R. WINTERS, *Secretary-Treasurer of the American Judicature Society and Editor of the Society's Journal*

Condensed from
Marquette University Law Review, Fall, 1949

MEDIEVAL churchmen, unwilling to consign dying babies and small children to eternal punishment for their childish misdeeds, established seven years as the age below which sin could not be committed. The criminal law followed along and fixed seven as the youngest age at which a child was capable of crime. The relation between the civil government and children under seven was that of guardian and ward. The Latin phrase was *parens patriae*—the state was a foster parent, and as such concerned with the care, protection and training of children left in its charge. All this abruptly ended at the age of seven, however, so far as legal theory was concerned, and too often practice as well. Criminal offenders from that age on up were dealt with as enemies of the state, tried in the regular criminal courts, and confined in penitentiaries along with older convicts of all types. I would like to be able to say that this is a matter of ancient history, but it is too true that locked up in jails and other houses of detention this very day and hour are thousands of children from seven to sixteen years of age, in the "care" of law enforcement officers of our states, counties and cities.

Charles Dickens and his great social novel *Oliver Twist* led off the movement for reform of this deplorable condition both in England and in other English-speaking countries, including our own, about a hundred years ago, although without doubt many sympathetic judges stretched the law for that purpose long before and made use of the suspended sentence and probation to mitigate its severity as they were introduced. In this country, a special juvenile court was first proposed in the 1891 Illinois legislature for Chicago. It passed in 1899, simultaneously with the setting up of the Denver Juvenile Court, which was the first to go into operation, under Judge Ben Lindsey, outstanding authority on juvenile delinquency, since removed to Los Angeles. The idea spread rapidly, and juvenile courts now exist in every state. In most localities they are operated in conjunction with other courts, such as dis-

trict, superior, common pleas and probate courts, but in every city of metropolitan size there is an entirely separate court especially designed for children's work.

The properly organized and managed juvenile court differs so much from other courts that the very word is hardly applicable to it, and indeed it would be all to the good if it were abandoned. In the first place, there is a complete absence of courtroom atmosphere. The attitude of the judge and officers of the court is one of sympathetic understanding and concern for the child's welfare. The particular act which brought the child under the jurisdiction of the court is of interest only as it sheds light on the problems and needs of the child. Probation, under expert supervision of the court, is the rule for disposition of cases, and when detention is necessary, either before or after the hearing, it is in special detention quarters unlike a jail or prison, and not in company with older criminals. Juvenile court records are complete and adequate, but they are kept in strict confidence, in contrast with most other court records which are public property available for inspection by anyone. Finally, a good juvenile court makes routine mental and physical examinations of all children that come before it, and supplies the judge with complete background information from home and school to

assist him in deciding what should be done.

Judge Paul W. Alexander of Toledo, one of the leading juvenile court judges of the country, has compared the juvenile court to a hospital, but would approve a slight extension of his analogy. Associated with most hospitals, but sometimes independent of them, are clinics where patients may go for examination, diagnosis and preventive treatment before anything as drastic as hospitalization is required. Facilities for investigation and examination already have been mentioned as part of the equipment of an adequate juvenile court. The services rendered by an enlightened community to its children are not complete unless those or similar facilities are made available on an out-patient basis to juveniles who have not yet run afoul of the law but are in danger of doing so unless their maladjustments are corrected and their difficulties straightened out by someone who can reach them in time and knows how to go about it. Such an institution may be called by a variety of names, but it is known generically as a *child guidance clinic.*

The first pioneering in this field was at the University of Pennsylvania around the turn of the century when so much progress was made in dealings with juvenile offenders. The first institution properly fitting the name was called the Juvenile Psychopathic Institute, and was established in Chicago in 1909, originally primarily as a research organization, but in cooperation with the Chicago Juvenile Court it developed extensive services in the fields of diagnosis and prognosis. About twenty-five years ago the National Committee for Mental Hygiene set up a Division on the Prevention of Delinquency, and about the same time the Commonwealth Fund of New York established a Joint Committee on Methods of Preventing Delinquency to coordinate, encourage and publicize the work of the Mental Hygiene group and certain other organizations at work on like projects. By means of demonstrations made possible through their joint efforts, they were able in five years to establish permanent child-guidance clinics in eight important metropolitan communities. The results were amazing. New clinics sprang up by the hundreds in all parts of the country, and today there are few communities of any size without their services.

From the standpoint of conservation of human resources, here is the most useful and promising institution of all. A fence around the top of the cliff is better than an ambulance down in the valley.

The age of sixteen or thereabouts is an important dividing line in the classification and treatment of criminal offenders. Juvenile court procedure is pred-

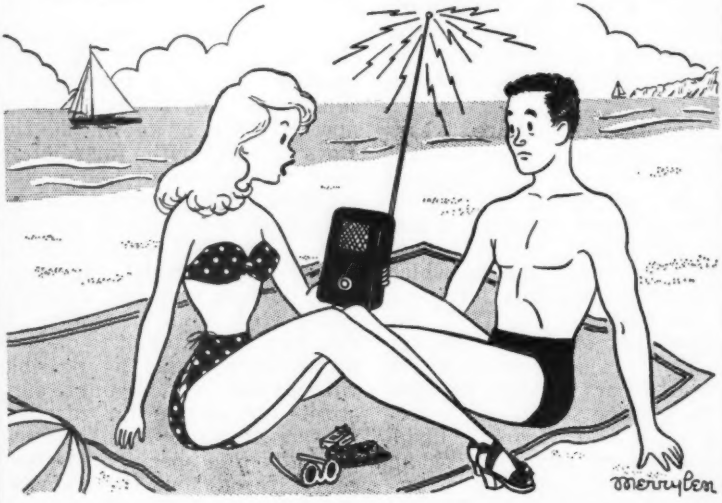
icated upon the invariable practice of children to confess their crimes in full. Older boys have learned to stand mute or deny them, and justice demands in such cases that their guilt or innocence be established by conventional legal process. Youths in their later teens commit a major portion of the crimes of violence which make the headlines, and their inexperience and lack of judgment make them relatively easy to catch. They present quite a different problem from criminals of any other age group, and a special terminology has been applied to them. Younger offenders are juvenile delinquents; these are "wayward minors." Both phrases really mean about the same thing, but they are not used interchangeably.

More than a hundred years ago a voluntary group established a work colony in England for the reclamation of criminal youths between the ages of sixteen and twenty, taking advantage of an ancient law by which such persons might be hired out in husbandry. In 1897 Sir Evelyn Ruggles-Brise, director of English prisons, set aside for male prisoners between the ages of sixteen and twenty-one a special prison in a Kentish village named Borstal, and organized an association of volunteers afterwards organized as the Borstal Association, for the purpose of visiting and befriending these boys during their imprisonment and helping them after their discharge. From these beginnings developed the renowned English Borstal System, now embracing youths of sixteen through twenty-three, and consisting at one time of nine corrective institutions, some of which have since been closed, of various types and grades ranging from a maximum-security walled prison for hardened criminals within that age group to agricultural and other work camps for more promising boys, all of whom are kept until ready to resume the responsibilities of free life, when they are released under the supervision of the Borstal Association.

In this country, Chicago again has the distinction of being the pioneer. In 1914 the Chicago Municipal Court instituted a special division known as the Boys' Court with jurisdiction over misdemeanors and quasi-criminal offenses committed by boys from seventeen to twenty-one. This was not an extension of the juvenile court. Its original purpose was to separate young from adult criminals. It did, however, attempt to dispose of as many cases as possible without court action, and to substitute preventive for disciplinary treatment. This has been the pattern of special adolescent courts throughout the country. A leading objective of proceedings under the Wayward Minors Acts of New York, Michigan and other states is to attempt to

get the youths on their feet again without the stigma attached to the word felon. Adolescents, courts in Brooklyn and Queens and the General Sessions Court in Manhattan, the former two operating under the Wayward Minors Act, have done the best they could under a well-meaning but imperfect law. In the middle of the last decade a Delinquency Committee of the Community Service Society of New York City made some shocking findings as to the shortcomings of legal treatment of this class of youths in that city. A few years before that, the American Law Institute, upon the completion of its model code of criminal procedure, had brought together a group of experts in criminology, psychiatry, sociology and social work along with leading lawyers and judges to see what might be done to improve the administration of criminal justice. The result was the model Youth Correction Authority Act, published in 1940.

The Youth Correction Authority Act is beamed at the wayward minor group—ages sixteen to twenty-one. It assumes that



"When I'm not at the office the boss can never find anything!"

they will go through the regular criminal courts of the state up to and including the point of conviction. At that point, unless the youth is merely to be fined, or sentence suspended, or unless he has committed a capital offense, he is committed to the Authority. That is the only sentence pronounced by the judge, and from there on the Authority takes over, makes such investigation as is warranted and administers whatever treatment it considers most appropriate for whatever length of time it deems necessary, the objective being the restoration of the subject to normal, productive life as soon as possible. Treatment may range from probation under supervision of the Authority, through occupational therapy in camps and on farms, to confinement in institutions of various grades of security.

Fortunately, one state was ready for this ambitious and revolutionary program. California had a tradition of social pioneering and experimentation, had led the way in development of the indeterminate sentence, and had already in existence an excellent forestry camp program for adolescent offenders. A remarkable coincidence paved the way for the introduction of the American Law Institute proposal. When two boys committed suicide at the state school for boys at Whittier (an exhibition piece as the last word in scientific treatment of juvenile delinquents) in 1940 the governor appointed an investigating committee headed by Judge Ben Lindsey. The Lindsey report, submitted December 6, 1940, was a devastating recital of medieval brutality and sadism carried on behind official indifference, and it profoundly shocked the faith of the people of that state in their existing correctional program. A statute setting up a system substantially in accord with the American Law Institute pattern was enacted by the 1941 legislature just a few months thereafter, and about a year after it had been published by the Institute. Bills were introduced at the same time in New York, Michigan, Pennsylvania, Rhode Island and Illinois, but no others were passed until 1948 when Wisconsin and Minnesota set up similar bodies. Massachusetts followed, with some modifications in 1949, and others may follow in the legislative sessions soon to begin throughout the country. Important parts of the program meanwhile have been adopted in New York and New Jersey, and bills for a Federal Youth Authority were introduced in both houses of the Eightieth Congress.

None of these others have yet had a chance to get under way, and we must depend for a view of the Youth Correction Authority in action on the California experience, which is now nearly eight years old.

The first unit of the California program is the diagnostic clinic. Here takes place the medical examination; the assemblage of a complete social and environmental background picture; psychological diagnosis to learn of possible psychological factors inclining the subject to crime and to uncover clues to constructive interest and activities that will assist in his rehabilitation; and a period of personal observation extending from four to six weeks. At the conclusion of this period all specialists who have participated in the case join in a conference where all findings are brought together and discussed and the most promising type of treatment is agreed upon.

A variety of facilities for different types of treatment are available. The Youth Authority has assumed charge of the state's probation department, which as in most states was undermanned and underpaid, and is making unprecedented use of this valuable corrective tool which not only saves the state most of the $1,000 a year which it currently costs to maintain a prisoner but in properly selected cases offers a maximum opportunity for rehabilitation.

It is not possible here to make anything like a complete survey of the operation and effectiveness of the California program. It was handicapped at the start by the added burdens resulting from the war, and was subject to some criticism at times. Other states held off from following its example for several years, but the enactment of similar legislation by three other states in the past three years is an indication that the experimental stage is over.

To avoid the unpleasant connotation existing in some minds against both of the words "Correction" and "Authority," the newer statutes have adopted more inoffensive titles for the agency created. Thus, we have the Minnesota Youth Conservation Commission, the Wisconsin Youth Service Division, and the Massachusetts Youth Service Board.

There is nothing about the corrective methods of either the juvenile court or the Youth Authority that would automatically make them inapplicable to adult offenders. Correctional work along these same lines undoubtedly would pay big dividends in that field also, and in 1944 California established an Adult Authority for that purpose. The emphasis on youth correction which has existed in the past and will continue to exist in the future is based simply on the principle that when you cannot reach everybody you should work where you can do the most good. Restoring to society a youth rather than a man saves the state more money in institutional costs avoided, and enriches the state by giving it the benefits of a longer productive life.

Legal Fees in the Past

By MORRIS WEISMAN of the Philadelphia Bar

Extracted from an article on the Schedule of Recommended Uniform Rates of the Commercial Law League of America in the Commercial Law Journal, January, 1950

IN ANCIENT Greece, gratuitous giving of legal services was the custom. In Rome, advocates were invariably of distinguished rank or wealthy, and public honors rather than fees were their compensation.

Ecclesiastical lawyers theoretically worked for charity. Hence it was unfitting, if not contrary to the rules of the Holy Orders, for them to accept fees. But if a client was so undelicate as to drop a fee into the lawyer's ecclesiastical hood, the latter would unbend enough to pull the strings and close the mouth of the hood, and so remove temptation from the path of potential sinners who might be led astray by the sight of unclaimed, unwanted and unguarded money.

In England the barrister still has no legal right to collect a fee, but this situation has been partly relieved by rules of the Law Societies.

The earnings of leading English and American lawyers of the past have varied considerably. Thus, Sir Edward Coke in one year made 7,000 pounds, and Lord Elden in 1787 earned a like amount. Lord Erskine, the most famous of English advocates, made more than 10,000 pounds a year. In 1798, John Marshall's $4,500 exceeded the income of any other Virginia lawyer. During the first decade of the last century, Alexander Hamilton of New York made between $12,000 and $14,000 a year and, in 1816, William Pinckney of Maryland $21,000. The first lawyer in New England to gain a practice of $10,000 was Theopolis Parsons of Boston who became Chief Justice of Massachusetts in 1806. At the time Joseph Story was appointed to the United States Supreme Court he earned about $6,000, and Daniel Webster $18,000 in 1834 and a maximum of $22,000 in 1836. However, these sums included his salary as United States Senator. The largest single fee he ever received was $7,500 while Abraham Lincoln's was $5,000. For twice arguing the celebrated income tax cases before the United States Supreme Court, Joseph Choate received a total of $34,000. In 1868 there were possibly fifteen attorneys in the United States earning $50,000 a year.

Among the New Decisions

Appeal and Error — *time for appeal as affected by motion for rehearing.* Under Florida law, neither the filing of a petition for a rehearing, nor a motion for the taxation of costs, interrupts the running of the time for appeal, according to the decision of Special Division A of the Florida Supreme Court in Lauderdale Development Co. v. Lauderdale Estates, 160 Fla 929, 39 So2d 364, 10 ALR2d 1072. The opinion is by Justice Barns.

An exhaustive discussion of "Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted" is to be found in the extensive annotation in 10 ALR 2d 1075.

Automobiles — *driving in ruts, etc.* The defendant in Ebben v. Farmers Mutual Automobile Insurance Co., 254 Wis 249, 36 NW2d 75, 10 ALR2d 895, owner and driver of a truck on which the decedent was riding, while driving at a rate of forty to forty-five miles per hour along a concrete highway, permitted the truck to run off the concrete pavement onto the shoulder of the road, which was from one to four inches lower than the pavement; and, in pulling to the left to bring the truck wheels over the obstacle and back on the pavement, the defendant caused the truck to swerve to the left across the road, and to collide with a telephone pole, killing the passenger. The Wisconsin Supreme Court, opinion by Judge Martin, held that as there was evidence in this wrongful death action from which the jury might have found that the defendant failed to exercise the skill and judgment which he possessed in the management and control of the truck, it was error for the trial court to change a special verdict of the jury to that effect and to dismiss the plaintiff's complaint.

The annotation in 10 ALR2d 901 entitled "Duty and liability of one driving motor vehicle in or along rut, ridge, or the like, in highway" presents in detail

those cases in which the courts have discussed the specific duty of a motor vehicle driver who is confronted with the particular driving hazard caused by a longitudinal unevenness in the road.

Automobiles — *notice and hearing before revocation of driver's license.* The opinion of Chief Justice Gibson of the California Supreme Court in Ratliff v. Lampton, 32 Cal2d 226, 195 P2d 792, 10 ALR2d 826, holds that statutory provisions for the revocation of an automobile driver's license upon any ground which would have justified its refusal, among which is inability to operate a motor vehicle safely because of a physical or a mental defect, which do not expressly require notice and hearing, may not be construed as contemplating summary revocation without notice and hearing because of a provision for administrative review, or because of a provision for an investigation to determine whether a license should be revoked where revocation was not in any event to be immediately effective.

The appended annotation in 10 ALR2d 833 discusses "Necessity and sufficiency of notice and hearing before revocation of driver's license."

Automobiles — *payment as affecting status within "guest" statutes.* The plaintiff in the personal injury action in Hasbrook v. Wingate, 152 Ohio St 50, 87 NE2d 87, 10 ALR2d 1342, was a woman who customarily rode in an automobile with her son-in-law, at whose home she lived, to their common place of employment, and occasionally, when he bought gasoline, contributed a dollar towards the purchase price. Riding with him enabled her to leave her own car at home for the use of her daughter, the son-in-law's wife. In view of the family relationship these circumstances were held by the Ohio Supreme Court, opinion by Judge Hart, not to make her a paying passenger rather than a guest and as such entitled to recover for the ordinary negligence of the son-in-law in the operation of the car.

The very practical question of "Payments or contributions by or on behalf of automobile rider as affecting his status as guest" is exhaustively discussed in the extensive annotation in 10 ALR 2d 1351.

Community Property — *spouse's personal tort.* An interesting community property question was before the New Mexico Supreme Court in McDonald v. Senn, 53 NM 198, 204 P2d 990, 10 ALR2d 966. The opinion by Chief Justice Brice held that a wife's interest in community real estate may be subjected to the payment of a judgment against her alone for a personal tort committed during coverture in the operation of an automobile constituting her separate property, where, as in New Mexico, her interest in the community prop-

erty is a vested legal interest upon which the judgment is a lien, even though under applicable statutes such property is not liable for her contracts, the husband alone has its management and control and power of testamentary disposition of his interest therein, and if he survives his wife he takes the whole.

Further detailed discussion of the question of "Subjection of community property or interest therein to satisfaction of personal tort liability of spouse" is found in the appended annotation in 10 ALR2d 988.

Construction Contracts — *"no damage" clause with respect to delay.* Psaty & Fuhrman v. Housing Authority, — RI —, 68 A2d 32, 10 ALR2d 789, involved cross actions in assumpsit brought by the employer and contractor named in a contract for the construction of a large housing project. The contractor sought to recover on the theory that the employer had hindered and delayed it in the performance of the contract and had ultimately refused to pay the balance of the contract price. The employer alleged nonperformance of the contract, omitted, unfinished, or defective work, liquidated damages for delay, and the common counts. The contract provided (1) that no payment should be made to the contractor for damages because of hindrance or delay, and (2) that the contractor should pay an agreed per diem for each day's delay in completion of the construction work and a smaller sum for each day's delay in the completion of the landscaping.

The Rhode Island Supreme Court, opinion by Judge Capotosto, upheld the action of the trial judge in sustaining a demurrer to counts of the contractor's declaration which alleged unreasonable hindrances or delays by the employer without charging bad faith or tortious conduct, but modified the judgment below with respect to certain credits allowed the employer for unfinished or defective work and also with respect to the number of days' delay for which liquidated damages were allowed the employer because of the contractor's failure to complete the construction work on time. The provision as to damages for delay in completing the landscaping was held unenforceable as embracing a penalty rather than liquidated damages.

The subject of the annotation in 10 ALR2d 801 is "Validity, construction, and application of 'no damage' clause with respect to delay in construction contract."

Contributory Negligence — *violation of statute.* In Koenig v. Patrick Construction Corp., 298 NY 313, 83 NE2d 133, 10 ALR2d 848, a window cleaner who, in consequence of his employer's failure to furnish him with a ladder equipped with safety shoes, was injured when the ladder on which he was working

slipped and precipitated him to the floor, brought an action to recover for his injuries. On appeal from a judgment in his favor, the New York Court of Appeals, opinion by Judge Fuld, held that although he was employed as an independent contractor, the fact that the employer actually directed the work brought him within the protection of a statute which provides that a person "employing or directing another to perform labor of any kind in . . . cleaning" shall furnish safe equipment; that contributory negligence was no defense to an action based on violation of such statute; and therefore that the giving of an instruction that plaintiff could not recover if guilty of contributory negligence was prejudicial error.

"Contributory negligence as a defense to a cause of action based upon violation of statute" is the subject of the annotation in 10 ALR2d 853.

Corporate Suit — *president's power to institute.* In Sterling Industries v. Ball Bearing Pen Corp., 298 NY 483, 84 NE2d 790, 10 ALR2d 694, the plaintiff corporation brought suit for breach of an alleged exclusive agency contract executed by plaintiff and defendant. It appeared that two groups of men organized plaintiff, one of them consisting of representatives of defendant. At a meeting of plaintiff's board of directors, of which there were

"Where do I think I'm going, dear?"

Jones on Evidence

THE LAW OF EVIDENCE IN CIVIL CASES
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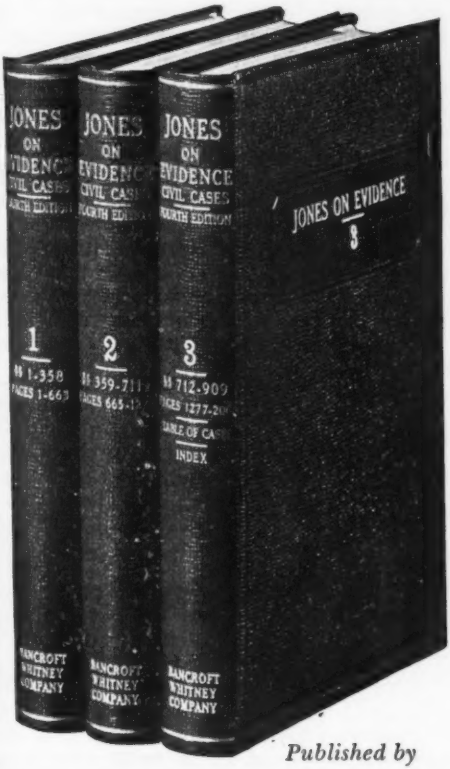

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four, a motion that the present litigation be instituted was approved by two of the directors and disapproved by the other two. Subsequently the suit was commenced by order of the plaintiff's president, who was a member of the organizational group which did not include defendant's representatives and who was one of the directors voting in favor of the motion that suit be commenced.

Holding that plaintiff's president had no authority to institute the action after a majority of the directors had failed to sanction it, the New York Court of Appeals, in an opinion by Judge Conway, reversed the Appellate Division and affirmed the action of the Special Term in vacating the service of the summons and complaint on the ground that plaintiff had not authorized the institution or prosecution of the action. The court suggested that the appropriate remedy was a stockholders' derivative action.

The annotation in 10 ALR2d 701 contains a detailed discussion of "Power of president of corporation to have litigation instituted by it where board of directors has failed or refused to grant permission."

Counterclaim — *tort counterclaim in tort action.* The South Carolina Supreme Court, in an opinion by Judge Fishburne, held in Baitary v. Ilderton, 214 SC 357, 52 SE2d 417, 10 ALR2d 1163, that a cause of action for slanderous words spoken wit reference to an alleged maliciou trespass and injury to propert of one charged therewith, set u as a counterclaim to an action fo trespass, is neither a "simila cause of action" nor one arisin "out of the same state of facts within a statute providing tha "in all actions sounding in to the defendant shall have th right to plead a similar cause o action against the plaintiff b way of counterclaim, provide that the cause of action of th plaintiff and defendant arise ou of the same state of facts."

An exhaustive discussion o "Cause of action in tort as coun terclaim in tort action" is foun in the annotation in 10 ALR2 1167.

Declaratory Judgments — *re lief against agreement not t compete.* The opinion of Chie Justice Maltbie, of the Connecti cut Supreme Court of Errors, i Beit v. Beit, 135 Conn 195, 413 63 A2d 161, 65 A2d 171, 10 ALR 2d 734, contains a very complete discussion of the use of the de claratory judgment action to de termine the enforceability of a covenant against engaging in a business or profession. The par ticular action involved the deter mination of the validity of a covenant by the seller of an in terest in a meat and grocery business not to re-engage in such business in the county for a specified period, it being held that a proper subject for de claratory relief was presented.

The subject of the appended annotation in 10 ALR2d 743 is "Relief against covenant restricting right to engage in business or profession, as subject of declaratory judgment."

Evidence — *acts as confidential communications within marital privilege.* In People v. Daghita, 299 NY 194, 86 NE2d 172, 10 ALR2d 1385, a wife was required to testify as a witness for the prosecution against her husband, who was charged with having stolen certain articles, that she had seen him bring home articles of that description and store them in various parts of the house, particularly under his bed. This was held by the New York Court of Appeals, opinion by Judge Conway, to involve the prohibited disclosure of a confidential communication made during marriage and so to be ground for reversal of his conviction.

"'Communications' within testimonial privilege of confidential communication between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse" is the subject of the extensive annotation in 10 ALR 2d 1389.

Explosives — *injury to child.* Questions of liability for injuries to a small child from the explosion of harmless-looking but highly dangerous fireworks bombs, apparently left discarded at night on the fairgrounds where a large number of people, including children, were known to be present, were before the New York Court of Appeals in Kingsland v. Erie County Agricultural Society, 298 NY 409, 84 NE2d 38, 10 ALR2d 1. The opinion, by Judge Conway, held that a county fair association and one with whom it contracted for a display of fireworks might properly be found guilty of negligence in leaving such bombs exposed and unguarded.

An exhaustive discussion of "Liability for injury by explosive or the like found by, or left accessible to, a child" is contained in the extensive annotation in 10 ALR2d 22.

Federal Employers' Liability Act — *employees in interstate commerce within.* Maxie v. Gulf, Mobile & Ohio Railroad Co., 358 Mo 1100, 219 SW2d 322, 10 ALR 2d 1273, involves an action for personal injuries under the Federal Employers' Liability Act by one employed by a railroad company as a car repairer who was, while at work, injured when freight car doors standing on end against a post back of him fell over on him. It was held by Division 1 of the Missouri Supreme Court, opinion by Presiding Judge Douglas, that as his general employment was in repairing cars used in interstate commerce, he was entitled to the benefit of the Act as amended in 1939, although the car which he was engaged in repairing at the time of the accident had been

withdrawn from such commerce.

The annotation in 10 ALR2d 1279 discusses "Who is an employee in interstate commerce within Federal Employers' Liability Act as amended in 1939."

Federal Procedure — *transfer to proper district.* In Re Collett, 337 US 55, 93 L ed 1207, 69 S Ct 944, 959, 10 ALR2d 921, the majority of the United States Supreme Court, in an opinion by Mr. Chief Justice Vinson, took the view that § 1404(a) of the revised title 28 of the United States Code, Judiciary and Judicial Procedure, effective on September 1, 1948, which authorizes a Federal district court for the convenience of parties and witnesses, in the interest of justice, to transfer "any civil action" to any other district or division where it might have been brought, extends to suits under the Federal Employers' Liability Act, including suits pending when the revised title 28 went into effect.

The "Constitutionality, construction, and application of Federal statutes providing for transfer of certain actions and proceedings to another district or division" is the subject of the annotation in 10 ALR2d 932.

"Jones, I think you misunderstood that promotion of yours."

Income Taxes — *subsidiary corporation.* National Carbide Corp. v. Commissioner, 336 US 422, 93 L ed 779, 69 S Ct 726, 10 ALR2d 566, involved the question of the taxable income of certain wholly owned subsidiary corporations. These subsidiaries were utilized as operating companies by the parent corporation under separate contracts with the parent, which provided in substance that the subsidiaries were to be employed as agents to manage and operate the plants designed for the production of the product assigned to each, and to sell the output of the plants, the parent corporation to furnish working capital, executive management and office facilities, the subsidiaries agreeing to pay all profits in excess of 6 per cent on their outstanding capital stock to the parent, the title to the assets utilized by the subsidiaries to be held by them, and amounts advanced by the parent for the purchase of assets and working capital to be shown on the books of the subsidiaries as accounts payable to the parent, with no interest running on these accounts. The United States Supreme Court, in an opinion by Mr. Chief Justice Vinson, held that all profits made by the subsidiary corporations were income taxable against them; that the subsidiaries could not escape tax liability either on the theory that they handled the income as mere agents of the parent or on the theory that the corporate entity might be disregarded for tax purposes under these facts.

The appended annotation in 10 ALR2d 576 further discusses "Income of subsidiary as taxable to it or to parent corporation."

Insurance Agents — *regulation of.* The United States Supreme Court in Daniel v. Family Security Life Insurance Co., 336 US 220, 93 L ed 632, 69 S Ct 550, 10 ALR2d 945, held that a state statute prohibiting undertakers from serving as agents for life insurance companies is not, as applied in a case where parties to insurance contracts contemplate use of the proceeds to pay funeral expenses, so unreasonable as to offend the due process clause of the Fourteenth Amendment. The opinion, by Mr. Justice Murphy, distinguishes Louis K. Liggett Co. v. Baldridge, 278 US 105, 73 L ed 204, 49 S Ct 57, on which the respondents relied.

An extensive discussion of "Public regulation or control of insurance agents or brokers" will be found in the annotation in 10 ALR2d 950.

Judges — *disqualification of.* In Hill v. Kesselring, 310 Ky 483, 220 SW2d 858, 10 ALR2d 1301, a petition to review the granting of a permit by a zoning commission to a religious organization for the erection of a church in a residential neighborhood and for the use of a portion of its land as a parking space for the automobiles of persons attending church services was

eard by a judge whose son, as ayor of the city, was an ex officio member of the zoning oard. The Kentucky Court of ppeals, opinion by Commisioner Stanley, held that under he circumstances kinship to one who was party in his official caacity did not disqualify the udge.

The extensive annotation in 10 ALR2d 1307 contains an exhausive discussion of "Interest of udge in an official or representtive capacity, or relationship f judge to one who is a party in n official or representative caacity, as disqualification."

Landlord and Tenant — *tenant's liability for damage to leased property.* The collapse of he floor of the rented refrigrated storage room involved in Gade v. National Creamery Co., 24 Mass 515, 87 NE2d 180, 10 ALR2d 1006, resulted in injury oth to the building and to the oods stored. The owner of the uilding and the lessee sued one nother for damages. The buildng in question was known to he lessee to be old. The floor as of wooden planking supportd by timbers 13 x 12, spaced 10" part, which had rotted where hey joined the wall at one end. The floor area was 740 square eet, and the stored goods eighed approximately 137,000 ounds. Delay in defrosting the efrigerator pipes added 5,000 ounds of ice to the load. The essee's agent, when the goods were put in, noticed that the floor was cracked. The Massachusetts Supreme Judicial Court, opinion by Judge Williams, held that there was no implied warranty that the premises were fit for storage, although the lessor knew that the lessee required the premises for immediate occupancy; that the tenancy being one at will, the tenant was not liable for permissive waste, but was liable for voluntary waste; and that the evidence warranted submission to the jury of the question whether there had been an improper and unreasonable overloading.

The "Liability of tenant for damage to the leased property due to his acts or neglect" is the subject of the annotation in 10 ALR2d 1012.

Lien on Chattel — *registration by nonresident.* According to the ALR editor's summary of Universal C. I. T. Credit Corp. v. Walters, 230 NC 443, 53 SE2d 520, 10 ALR2d 758, an automobile was purchased under a conditional sale contract in Illinois by a resident thereof. The contract was duly registered in that state as required by applicable statutes. Later the purchaser took the car on a visit to North Carolina, where it was levied on under an execution against the purchaser. The conditional sale contract was never recorded in North Carolina. The present suit in claim and delivery was brought by the assignee

of the conditional vendor to recover possession of the car, but since the car had been sold, the controversy was over the proceeds of the sale.

Construing a North Carolina statute relating to the registration of chattel mortgages and conditional sale contracts executed by a nonresident as being inapplicable to instruments covering personal property only temporarily in the state and having no actual situs there, the North Carolina Supreme Court, in an opinion by Judge Barnhill, affirmed the judgment below awarding the sale proceeds t the plaintiff free and clear of an claim of the execution creditor

"Construction and application of statutory provision respecting registration of mortgages o other liens on personal property in case of residents of other states" is the title of the anno tation in 10 ALR2d 764.

Limitation of Actions — *unre ported automobile accident a tolling.* The plaintiff adminis tratrix sued in St. Clair v. Bards town Transfer Line, 310 Ky 776 221 SW2d 679, 10 ALR2d 560

"Just as a matter of curiosity, Miss Phelps — How do you write 'low-down louse' in shorthand?"

for the death of her intestate, who was killed when struck by defendant's motor truck. Her petition was filed one year, four months, and twelve days after decedent's death. The applicable limitation period for an action of the kind in question was one year. In reply to defendant's plea of the statute plaintiff alleged that defendant's agent in charge of the truck at the time of the accident failed to stop at the scene of the accident, fled therefrom, failed to report the occurrence to the state police as required by an applicable statute, and concealed the identity of the owner and operator of the truck, with the result that plaintiff did not have sufficient information on which to base a death action against defendant until after the expiration of the period of limitations. The lower court sustained a demurrer to the reply and dismissed plaintiff's petition.

Holding that the allegations of the reply were sufficient to bring plaintiff within a provision of the statute of limitations tolling the statute with respect to causes of action accruing against one who absconds, conceals himself, or by any other means obstructs the prosecution of the action, the Kentucky Court of Appeals, opinion by Judge Thomas, found the trial court in error and reversed the judgment with directions to overrule the demurrer.

The subject of the annotation in 10 ALR2d 564 is "Failure to comply with statute requiring one involved in automobile accident to stop or report as affecting question as to suspension or tolling statute of limitation."

Loud-speakers — *regulation of use in public places.* A city ordinance prohibited the operation upon the streets of sound amplifiers or other instruments which emit "loud and raucous noises" and are attached to vehicles operated or standing upon such streets. A conviction for a violation of this ordinance, affirmed by the state appellate courts, was further affirmed by a majority of the Supreme Court of the United States in Kovacs v. Cooper, 336 US 77, 93 L ed 513, 69 S Ct 448, 10 ALR2d 608, as against the objections that the ordinance was lacking in definiteness and that it infringed upon the constitutional right of free speech. Mr. Justice Reed announced the judgment of the Court and an opinion in which The Chief Justice and Mr. Justice Burton joined. Eight members of the Court—all except Murphy, J.—agreed that sound amplification in streets and public places is subject to reasonable regulation and, at least, did not disagree that an ordinance prohibiting the emission of "loud and raucous noises" does not go beyond reasonable regulation. Two of the eight—Frankfurter and Jackson, JJ.—went further, holding that the use of sound trucks in streets may be abso-

lutely prohibited without violating the constitutional right of free speech.

The interesting question of "Public regulation and prohibition of sound amplifiers or loudspeaker broadcasts in streets and other public places" is discussed in detail in the appended annotation in 10 ALR2d 627.

Malicious Prosecution — *prosecuting attorney's advice as defense.* In Schnathorst v. Williams, — Iowa —, 36 NW2d 739, 10 ALR2d 1199, the Iowa Supreme Court, opinion by Judge Bliss, holds that to be a good defense to an action for malicious prosecution, the seeking of the advice of the county attorney before instituting a criminal proceeding must have been in good faith, from honest motives and for good purposes, after a full and fair disclosure of all matters having a bearing on the case, and the advice received must have been followed in good faith with honest belief in the probable guilt of the one suspected.

Further exhaustive discussion of "Reliance on advice of prosecuting attorney as defense to malicious prosecution action" is found in the extensive annotation in 10 ALR2d 1215.

New Trial — *inconsistent statements of witness as basis for.* A new trial of an action growing out of an automobile collision in which a verdict was rendered for the defendant was unsuccessfully sought in Taylor v. Ross, 150 Ohio St 448, 83 NE 2d 222, 10 ALR2d 377, on the ground of newly discovered evidence in the form of statements made by the defendant out of court contradictory to his testimony at the trial. On appeal the Ohio Supreme Court, opinion by Chief Justice Weygandt, held that while recanting statements are ordinarily unreliable and hence to be closely scrutinized when made the ground for a motion for a new trial, the granting or refusal of a new trial was within the discretion of the trial court.

The extensive annotation in 10 ALR2d 381 discusses "Statements of witness in civil action secured after trial, inconsistent with his testimony, as basis for new trial on ground of newly discovered evidence."

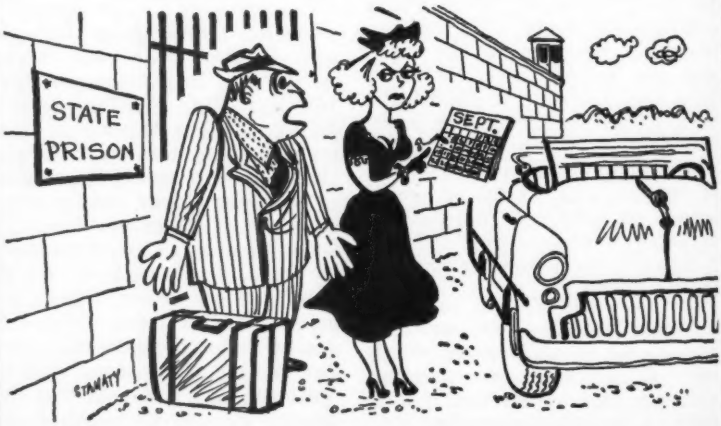
Option to Purchase — *termination of lease as termination of.* In Estfan v. Hawks, 166 Kan 712, 204 P2d 780, 10 ALR2d 877, a three-year lease gave the tenant an option to purchase upon a thirty-day notice, to be given thirty days prior to the date of its expiration. The lease was, however, terminable by the lessor at any time on sixty days' notice. Such notice was given, and thirty days before the end of the sixty days, the tenant gave notice of an exercise of the option to purchase. It was held by the Kansas Supreme Court, opinion by Judge Price, that as the lease and option rested upon

a common and undivided consideration, the option terminated with the lease, which was held to have terminated on the date the notice of termination was given.

The annotation in 10 ALR2d 884 is entitled "Termination of lease as termination of option to purchase therein contained."

Preferred Stock — *effect of overpayment of dividends.* The corporation involved in Agnew v. American Ice Co., 2 NJ 291, 66 A2d 330, 10 ALR2d 232, for a period of ten years paid reduced dividends on its noncumulative preferred stock, in some years paying none at all. For some years the annual earnings exceeded the dividends paid on the preferred stock and in other years such dividends exceeded the earnings. The company having declared a dividend on common stock, certain preferred stockholders brought an action to restrain payment thereof until their accumulated dividend preference was paid. The New Jersey Supreme Court, in an opinion by Justice Heher, held that the accumulated preferences of the preferred stockholders were reducible by the amount that the dividends paid on their stock in prior years exceeded the sums properly payable for such dividends.

The annotation in 10 ALR2d 241 discusses "Overpayments of dividends on preferred stock as



"I'm sorry, dear. I got away as soon as I could."

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Public Utilities — *discontinuance of unprofitable branch.* The Maryland Court of Appeals, opinion by Judge Delaplaine, held in Hessey v. Capital Transit Co., — Md —, 66 A2d 787, 10 ALR2d 1114, that an electric railroad company could not, in the absence of statutory or charter obligation, be compelled to operate even a branch of its line at a loss. It accordingly, after an examination of the evidence introduced before the State Public Service Commission, convincingly disclosed that the company was sustaining a loss in the operation of shuttle cars between two designated points, affirmed a decree of the Circuit Court which restrained the Commission from enforcing its order refusing the company permission to abandon the line.

The extensive annotation in 10 ALR2d 1121 contains an exhaustive discussion of "Right of public utility to discontinue line or branch on ground that it is unprofitable."

Rent Control — *Federal Housing and Rent Act of 1947.* In Graylyn Bainbridge Corp. v. Woods, 173 F2d 790, 10 ALR2d 242, the defendant owner and operator of a housing accommodation in a defense-rental area refused to permit the representatives of the Federal Housing Expediter to make an inspection of the premises and interview the tenants therein. The plaintiff, Housing Expediter, brought suit for an injunction permitting him to make such investigation. The Eighth Circuit, in an opinion by Circuit Judge Collet, overruling the defendant's contention that under the Federal Housing and Rent Act of 1947 the court below had no power to issue injunction with respect to violation of mere administrative regulation, and that, in any event, such an injunction should not issue until it was first established that the accommodation in question was a controlled housing accommodation within the meaning of the Act, affirmed the action of the District Court in issuing the injunction.

The numerous questions arising under "Federal Housing and Rent Act of 1947 and amendments" are discussed in the annotation in 10 ALR2d 249.

Res Judicata — *change of neighborhood.* The District of Columbia Circuit, in an opinion by Circuit Judge Prettyman, held in Saint Lo Construction Co. v. Koenigsberger, 84 App DC 319, 174 F2d 25, 10 ALR2d 349, that in a suit to enjoin the violation of a covenant restricting the use of property to private dwellings, resisted on the ground that changes in the neighborhood rendered its enforcement inequitable, a judgment refusing to cancel the injunction was res judicata as to the absence of changes in the neighborhood

prior to its rendition, even though it was rendered without a statement of findings of fact and conclusions of law. The case is apparently one of first impression.

The annotation in 10 ALR2d 357 discusses "Judgment in suit for cancelation of restrictive covenant on ground of change in neighborhood as res judicata in suit for injunction against enforcement of covenant on that ground, and vice versa."

Res Judicata — *declaratory judgments.* The Kentucky Court of Appeals, in Cooke v. Gaidry, 309 Ky 727, 218 SW2d 960, 10 ALR2d 778, opinion by Commissioner Van Sant, held that the rule that a former judgment is conclusive not only of all matters actually adjudicated thereby but also of all matters which could have been presented for adjudication was inapplicable to an action brought by a tenant for an adjudication of the rights of the parties under a lease; that a judgment in the declaratory action that an alleged lease did not exist was not a bar to the landlord's petition for further relief by the enforcement of the tenant's statutory liability for double rent.

The "Extent to which principles of res judicata are applicable to judgments in actions for declaratory relief" is the subject of the annotation in 10 ALR2d 782.

Social Security — *taxicab driver as employee or independent contractor.* The liability for social security taxes of the operator of a fleet of taxicabs was involved in Party Cab Co. v. United States, 172 F2d 87, 10 ALR2d 358, cert den 338 US 818, 94 L ed —, 70 S Ct 62. This operator garaged the cabs, kept them in repair, obtained licenses and personal injury insurance, and rented its cabs from day to day at a fixed amount to drivers who furnished oil and gasoline, retained the fares they received, and were not required to respond to calls received from the operator. A majority of the Seventh Circuit, opinion by Chief Judge Major, held the operator not liable for social security taxes in respect of such drivers, in view of the 1948 amendment to the Social Security Act making common-law standards the test of the existence of an employer-employee relation.

The annotation in 10 ALR2d 369 discusses "Taxicab driver as employee of owner of cab, or independent contractor, within social security and unemployment insurance statutes."

Support and Maintenance — *husband's defenses in civil suit by wife.* The Connecticut Supreme Court of Errors, in Martin v. Martin, 134 Conn 354, 57 A2d 622, 10 ALR2d 463, had before it a wife's action for support against her husband, who, after walking out of the house following a quarrel with his wife

and finding the door padlocked against him upon his return, refused to continue living with and supporting her. In an opinion by Judge Dickenson, it was held that a wife may successfully maintain a support action if she has not forfeited the right to support by her own conduct, and that under the somewhat complicated circumstances of the instant case the husband was not justified in withholding support.

"Defenses available to husband in civil suit by wife for support" is the subject of the extensive annotation in 10 ALR2d 466.

Tax Returns — *statutory regulation of aides.* In Moore v. Grillis, 205 Miss 865, 39 So2d 505, 10 ALR2d 1425, one who was not a certified public accountant sought to recover for services rendered in the preparation of income tax returns. The defendant pleaded that the contract for the services violated a statute providing for the examination and certification of public accountants, prohibiting anyone not so certified from styling himself a certified public accountant, and making it a misdemeanor for anyone except a certified public accountant or an attorney in the practice of law to charge or receive a fee or compensation for making or preparing any tax return. The plaintiff attacked the constitutionality of this statute.

The majority of the Mississippi Supreme Court (In Banc), in an opinion by Judge Smith, held on appeal that the statute, in so far as it prohibited persons other than certified public accountants and attorneys from charging for services in connection with tax returns, was unconstitutional, in that it was not a reasonable exercise of the police power, was arbitrarily discriminatory, was not in promotion of the public welfare, and was without reasonable relation to the advancement of the public convenience, prosperity, health, morals, or safety. That portion of the statute providing for the examination and certification of accountants was held to be within the constitutional power of the legislature. The court indicated that the statute infringed the right of accountants not certified, and others engaged in preparing tax returns, to pursue their occupation gainfully, that it tended to establish a monopoly in attorneys and certified public accountants, and that it restricted the liberty of the people to contract. Hall, J., dissented.

The "Constitutionality, construction, and application of statutory provisions respecting persons who may prepare tax returns for others" is the subject of the annotation in 10 ALR2d 1443.

Unborn Children — *action for death of.* The Minnesota Supreme Court had before it in Verkennes v. Corniea, — Minn —, 38 NW2d 838, 10 ALR2d 634, an appeal from an order sus-

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taining a demurrer to a complaint in an action by a special administrator for the wrongful death of an unborn infant. The complaint alleged that, through the negligence of the defendant hospital and physician, while the mother of the infant was confined in the hospital for the delivery of the child, the latter was killed before birth, and that otherwise she would have been born alive a normal and healthy child. The mother also died on the same occasion. On appeal, in an opinion by Judge Thomas Gallagher, it was held that the complaint stated a cause of action and that the administrator of the estate of an unborn viable infant whose death was negligently caused before its birth could maintain an action under the wrongful death statute for the death of the infant.

The title of the annotation in 10 ALR2d 639 is "Action for death of unborn child."

Unborn Children — *injury to.* The petition, in Williams v. Marion Rapid Transit, 152 Ohio St 114, 87 NE2d 334, 10 ALR2d 1051, in an action on behalf of an infant by its father as next friend, alleged that while the child's mother was pregnant with her and while the child was an existing, viable child, the mother fell from the steps of a bus operated by the defendant carrier as a result of the defendant's negligence, resulting in the injury, eventually fatal, of the mother, and in the premature birth and injury of the plaintiff, and alleged the nature of the prenatal injuries to the plaintiff. The Ohio Court of Appeals reversed a decision of the trial court sustaining a general demurrer to the petition, and the Ohio Supreme Court, in an opinion by Judge Matthias, affirmed the Court of Appeals, taking the view that an unborn child which is viable and capable of existence independently of its mother is a "person" within the constitutional provision affording a remedy to every person for injury done him in his person.

The important and novel question of whether the solicitude of the law for the protection against unborn infants extends to their protection against the torts of others is further discussed in the annotation in 10 ALR2d 1059 entitled "Prenatal injury as ground of action."

TAXES AND YOUR CLIENT

The Tax Side of Everyday Legal Problems

By BERNARD SPEISMAN of the New York Bar

Tax Attorney, The Lawyers Co-operative Publishing Co.
Editor, Alexander Federal Tax Handbook
Former Editor, Alexander Tax News Letter

Beneficial Aspects of Compensation Payments to an Employee's Widow or Heir

HIGH surtax rates on income are responsible for the current accent on plans which aim to defer compensation to reduced-income years and thus incur lower surtax rates. The same circumstance may be responsible for a recent incidence of cases involving payments to widows of deceased employees. These invite interest because of the relatively meager background on the subject and because of potential benefits—or pitfalls—that may be overlooked in planning similar payments.

Tax-wise, consideration must be given to the deductibility of the payments by the corporate payor and their taxability to the widow or heirs. If a payor may deduct, it is usually a corollary that the recipient must include the amount in gross taxable income. Payments to a widow provide a limited exception to this rule, applicable to payments which are voluntary and not contractual in origin. Of the former type, the Regulations provide:

"When the amount of salary of an officer or employee is paid for a limited period after his death to his widow or heirs, in recognition of the services rendered by the individual, such payments may be deducted." (Treas Regs 111, § 29.23 (a)-9.)

At the same time, I. T. 3329 (CB 1939-2, p 153) holds that such payments are gifts, hence not taxable to the recipient; and the Tax Court applied this principle recently in the case of Aprill v. Commissioner (1949, F) 13 T Ct 707.

The difficulty, of course, is that the Regulation is rather indefinite in so far as it refers to a "limited period." Though this provision has been in the Regu-

lations since 1918, the clue to its meaning must, oddly enough, be sought in recent cases. In McLaughlin Gormley King Co. v. Commissioner (1948, F) 11 T Ct 569, the directors of the taxpayer corporation voted to pay a monthly pension of $300, or about half the salary of its deceased president, to his widow for life. The Commissioner allowed the deduction of the amounts paid for a period of 29 months and disallowed all further deductions. On the taxpayer's appeal, the Tax Court approved the Commissioner's action, finding that the apparent aim was to provide for the widow's needs rather than make up any inadequacy in the president's compensation for the earlier years.

The record in the Aprill case, supra, reveals that the Commissioner allowed the deduction of the full salary of its president and majority stockholder—$20,000 per year—for a period of 30 months. In I.T. 3329, the Internal Revenue Bureau ruled that gratuitous payments made in 1937 and 1938 to the widow of an officer-stockholder who had died in January, 1937, were deductible. No generalization can be drawn from these instances but they do provide a clue to what may be acceptable to the Commissioner in similar circumstances.

On the other hand, it is becoming clear that payments to a widow, or heir, which are contractual in origin, will be considered as taxable income to the recipient (Flarsheim v. United States (1946, CA8th Mo) 156 F2d 105; Estate of Remington v. Commissioner (1947, F) 7 T Ct 99).

This view may have some basis as to amounts received in taxable years after 1941 since Congress, in enacting § 126 as part of the Revenue Act of 1942, manifested a purpose to tax items of gross income in respect of a decedent to the person who "by reason of the death of the decedent" acquires the right to receive the amount (Est. of Thomas F. Remington, supra). For years prior to 1942, the rule seems vulnerable. In the absence of statutory prescription, income is taxable to the one earning it and not to an assignee who receives the income. According to a classic tax metaphor, the fruits may not be attributed to a different tree from that on which they grew (Holmes, J., in Lucas v. Earl (1930) 281 US 111, 74 L ed 731, 50 S Ct 241).

Whether contractual payments to the widow or heir of an employee may be deducted by the payor depends on whether the payments represent reasonable compensation for the services performed by the deceased employee. It depends, in other words, on the bona fides of the contract. A recent case illustrates this basic tax approach.

The decedent had transferred

his business to a corporation formed in April, 1944, for all its stock upon his attorney's suggestion that it would give his sons better protection and his wife could be paid a pension. In the agreement of transfer, the corporation agreed to pay the decedent's widow a pension of $350 per month for life after his death.

The decedent was then 82 years old and he died about seven months later. In holding that the corporation might not deduct the pension paid under this agreement, the Tax Court noted that, "in the absence of a contract liability, an established pension policy, or a showing that such payments were for past compensation and were reasonable in amount, the payments may not be deducted under Section 23 (a)."

While the payments at issue were made under a contract, the Court concluded that they were not made pursuant to a contract entered into at arm's length to retain the services of a valuable employee.

Taxation is primarily practical. An agreement providing lifelong benefits to the widow of an employee who owned little or no stock might not even be questioned if manifestly made at arm's length. Similar benefits for the widow of an officer-stockholder owning a controlling interest in the corporate payor might stand up if there was convincing evidence that the officer had contributed substantial services in the past for which he had not been adequately compensated.

Doubtless, such payments would be less vulnerable if part of a general pension plan, but such a plan would probably have to meet the technical requirements of § 165, I.R.C., relating to pension and profit-sharing trusts and annuities. (See § 23 (p) (1), I.R.C.)

Apart from such a plan, short-term benefits are most beneficial in the case of a controlling officer-stockholder and, wherever feasible, are better left to the voluntary discretion of the directors, since this gives the widow a reasonable chance of avoiding taxation of the receipts.

Excessive payments of this character, as the cited cases indicate, are likely to be taxed to the widow or heirs as dividends. In cases where the decedent's interest has been sold to the corporation, excessive payments may be regarded as in payment therefor, so non-taxable to the widow or heirs until the cost basis of the interest has first been recovered. (See § 113(a) (5), I.R.C.)

Even contractual payments to a widow or heir, in the nature of deferred compensation, are likely to provide a tax economy inasmuch as the widow or heir is likely to be in a lower surtax bracket than the decedent would have been had he received the amounts himself.

Purchase of Life Insurance by Wife—Estate Tax Benefit

THE PROBLEM of disposing of an estate effectively does not end with the drawing of a will, as many an attorney who has served as executor has learned. Too often, individuals of means overlook the need of liquidity to pay estate taxes and other obligations and their executors are forced to sacrifice assets in order to provide cash to settle the estate.

A convenient means of providing cash for estate taxes is by the purchase of life insurance. However, if the insurance is purchased by the decedent, the proceeds will be an additional asset of his estate increasing the estate tax liability at his death.

It is sometimes expedient for a wife to take out insurance on her husband's life. In such a case, the proceeds will not be subject to estate tax at the husband's death, provided—

a. the proceeds are payable to a beneficiary other than the executor of the husband's estate.

b. the husband possesses none of the incidents of ownership at death—the right to borrow, change beneficiaries, etc.

c. the husband pays no premiums directly or indirectly. The proceeds will be includible in his gross taxable estate to the extent that he has paid the premiums therefor.

Since, frequently, the only property owned by the wife has been acquired from the husband, it becomes relevant to inquire whether payment from such funds may be regarded as indirectly made by the husband.

Interpreting the provision respecting indirect payment, the Regulations assert that it "is intended to be broad in scope. For example, if the decedent transfers funds to his wife so that she may purchase insurance on his life, and she purchases such insurance, the payments are considered to have been made by the decedent even though they are not directly traceable to the precise funds transferred by the decedent." (Treas Regs 105, § 81.27(a)).

In Estate of Cain v. Commissioner (1941, F) 43 BTA 1133, the decedent had paid $4,557 in premiums on a policy on his life. His wife had paid $27,708.37 in premiums from her own funds which she had acquired as gifts from her husband at various times during their marriage. On these facts the Tax Court held the premiums had not been paid indirectly by the husband.

There have been few decisions directly in point and that lends added interest to a new case in which it appears that the insured decedent gave his wife $2,500 in September 1943 for a fur coat. On July 2, 1945 she deposited it in a joint account in her own name and her husband's, and it was later used in part to pay premiums. The Tax Court's opinion states:

"Thus we conclude the $2,500 did not constitute a gift from him to enable her to pay future insurance premiums. The fact alone that premium payments are made by a wife out of property she received as a gift from her husband at an earlier time does not justify attributing the premium payments to him as an indirect payment." (Estate of Saunders v. Commissioner (F) 14 T Ct No. 65).

The pattern is familiar. As in most transactions involving a husband and wife, the tax consequences depend on good faith. Funds received from the husband and used by the wife to pay premiums on insurance on the husband's life will not be attributed to him if he gave them to her in good faith for reasons other than to enable her to pay the premiums.

As to the husband's motive in making the gift, objective circumstances are likely to prove more persuasive than oral testimony. The time elapsing between gift and payment of premiums, whether the husband was accustomed to make similar gifts to the wife, and the reason for not effectuating the original purpose of the gift, if any positive purpose was expressed, are among the factors which may be decisive.

It is not, however, a good practice for the wife to use funds from a joint account of herself and her husband because she would then have the burden of proving precisely what part of the funds used was originally her separate property and, failing such proof, the payments would be attributed to the husband.

People Who Intrigue Me

I would that some day I could know
John Doe, Jane Doe and Richard Roe.
Is John the loving spouse of Jane?
And what is Roe unto the twain?
By whate'er tie these three are bound,
They certainly do get around,
They're always in The Law's embraces,
Yet no one ever sees their faces!
The day I hale to Court some bloke, O
Shall we at long last meet *hoc loco?*

—PEGGY WAGNER
Reno, Nevada

We'll Take 'Em, Too

It's a cold, cruel world if you read the front pages: politics, crime, and the cold war rages; the high cost of living, the threat of atomics. You take the front pages—I'll take the comics!

—The Safe Worker

Experiments in Legal Education

By BENJAMIN F. BOYER
Dean, Temple University School of Law

Reprinted from The Shingle, February, 1950

WORLD WAR II has been blamed for many changes in our ways of life. It must also bear the responsibility for many of the changes which have occurred in the law school world since 1945. Indeed, much of the experimentation now going on in legal education is directly attributable to the desire of the new group of teachers who came to the schools from the armed forces to apply in their law teaching methods and techniques learned in their wartime service.

The War's first impact on the law schools resulted in removing students and potential students and teachers from the classroom and placing them in uniform. Law school attendance dropped from a nation-wide pre-war enrollment of some 40,000 students to an all-time low of only 6,832 in 1943. Even at the war's end, in 1945, enrollment nationally had risen only to 10,790 students in 124 law schools. But with the rapid demobilization of the nation's armed forces there came the deluge! By 1947 law student enrollment had grown to fifty thousand. And the end is not yet, for even in the present year there are 56,289 law students studying in the 150 law schools in operation in the United States.

The tremendous demand for legal education caused law schools to expand the size of their classes and to adopt acceleration programs with round-the-calendar schedules for faculty and student body. Even with the accelerated program, however, the schools were not able to take all students who applied. It became necessary to devise and employ selection methods which would indicate the applicant's likelihood of being successful in legal study. Both the Army and Navy had used numerous aptitude tests as effective means of determining the men who were to be assigned to specific duties or selected for particular training courses. It was but natural that the law schools should turn to the same means for selecting their first year students. Pre-war experience at Yale and with the Iowa Legal Aptitude Test devised by Adams, Tunks and Stuit furnished additional impetus to the

movement to require all applicants to submit results of such a test along with their college records.

Some law schools now employ the services of the Educational Testing Service of Princeton, New Jersey, in administering legal aptitude tests. Other schools, Temple University, for example, have devised their own legal aptitude tests. At Temple, Doctor Harold Reppert and the writer have used a battery of tests covering psychological attainment, interpretation of reading materials, reading comprehension, general culture and English usage as well as the Iowa Legal Aptitude Test, to obtain a basis for predicting success in legal study. We are still gathering statistical information on the effectiveness of our Temple test. This much has already been revealed: the test does indicate those applicants who are least likely to succeed in legal study. With twice as many students applying for admission as we can accommodate, some such device is required if we are to select those who can profit best from legal study.

The use of aptitude tests as a basis for the selection of students is not the only change to follow in the wake of World War II in the Law Schools. In addition, there have been changes in curriculum and in teaching methods. Outstanding in curricular changes is the now almost universal practice of providing some type of introductory course, such as the course in Legal Method, for first-year law students in a studied effort to familiarize them quickly with library facilities and resources as well as with the role of case-law and legislation in our legal system. Some schools are setting aside the students' first week in law school for a specific orientation in briefing techniques, legal vocabulary and methods of study. Needless to say, course content has been enlarged and many new courses added. These additions are chiefly found in the public law field.

Changes in teaching methods emphasize the fact that the "case method" of legal study now seems inadequate. In the case method thorough training is given in legal analysis but the method itself is time-consuming; in addition, it overemphasizes the reasoning employed by courts of last resort. The present day student needs training in the skills of the counsellor and the researcher as well as in those of the judge. He now can fill the need for these additional skills in problem and seminar courses including legal writing and briefing.

It is often said that medical students learn by doing, while law students learn by reading. At Temple University the faculty believe that there is a pressing need to bridge the gap between classroom and courtroom

so that our graduates will be better equipped to practice their profession. One effort at bridging the gap is found in our course entitled "Pennsylvania Practice Clinic." In that course Professor Bertram K. Wolfe organizes the students into groups of three and then assigns to each group the duty of representing hypothetical clients concerned with particular sets of facts. The groups develop legal pleadings from the facts given them. These pleadings are assigned to other student groups and they file appropriate motions. Arguments on the motions occur, as do other necessary pre-trial steps. When issue is finally joined a trial occurs. The trial, in turn, is followed by appropriate post-trial motions and arguments. By the end of the course the entire class is familiar with Pennsylvania trial practice. And, as Judge Charles Klein of the Philadelphia Orphans' Court who suggested this course says, "we are making progress in closing the gap between the law school and the practitioner's office."

Outstanding in post-war legal education is the experimentation which has employed audio-visual aids to assist in teaching law. The war demonstrated, if nothing else had, that teaching increases in effectiveness as teaching aids are used. The pre-war law teacher seems to have depended almost wholly on reading and the teacher's words. Post-war legal education need not do so, for visual and audio-aids are now available to assist in the task of training. Indeed, it may be said, Hollywood has come to the classroom!

Two films are on the market. One, prepared by Harvard Law School, and titled, "Case in Point", shows in Technicolor how to find one's way around the Law Library as well as an appropriate way to prepare and argue a moot court case. The other film has been prepared by the School of Law of the University of Washington. It is called "Trial by Jury" and shows in full detail the entire course of a negligence trial in that state. Other schools, particularly the University of Southern California and the University of Michigan, are preparing new films now. Even in the field of Commercial Law there is possibility of providing motion picture assistance for the teaching of technical subjects. A commercial producer has indicated a willingness to prepare a film on Negotiable Instruments. Use of

such films gives reality to factual and legal problems that is not present when cold type is relied upon for orientation.

Another teaching aid has only recently become available. By it one uses phonograph records to help teach the course in Evidence! This device—called "Electroni-Court"—was invented by Louis E. Schwartz, Esquire, of the Brooklyn, New York, Bar. Primarily, Mr. Schwartz has created two types of records to aid the Evidence instructor. One type reviews the subject matter of a particular chapter in a well-known Evidence case book. When the chapter is completed, the class and instructor spend thirty minutes listening to the phonograph record and marking decisions on objections stated to testimony presented by the records. In twenty minutes the student is asked to rule on twenty objections. This device is the only audio-aid I have ever seen that demands and gets 100% student participation.

The second type of record prepared by Mr. Schwartz is suitable for use toward the close of the Evidence course. In its use, the student has presented to him typical objections testing his knowledge and competence as to the whole course.

It is to be expected that audio-visual aids suitable for use in law teaching will continue to develop. As they do, the student and the law teacher will both profit by their use.

This summary survey of some of the experiments now being conducted in legal education is offered to the bar in the hope that its members will be willing to "think on these things" and advise the schools of their reactions and suggestions. The practitioner can be of real assistance to the law faculties if he will make his opinion and suggestions known.

Properly Admissible

The lawyer was browbeating the witness. "I understand," he said fiercely, "that you called on the defendant. Is that so?"

"Yes," replied the witness.

"What did he say?" continued the lawyer.

At this point the counsel for the opposition objected that evidence as to conversation was not admissible. An hour's argument ensued. Then the court retired to consider the point, returning after considerable time to announce the question a proper one.

"What did he say?" repeated the lawyer, with a confident smile.

"He wasn't home, sir," came the answer.—*L & N Mag*, Louisville & Nashville Ry.

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